

LEE AH LIN

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v.

LEE CHOON KET & ORS

HIGH COURT MALAYA, KUALA LUMPUR

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HAMID SULTAN ABU BACKER J

[SUIT NO: D1-26-76-2008]

4 NOVEMBER 2011

COMPANY LAW: *Oppression - Relief - Petition under s. 181 Companies Act 1965 - Whether petition could be maintained when companies had been wound up - Whether petition could be filed against two or more companies - Henrick International Hotels & Resorts Pte Ltd v. YTL Hotels & Properties Sdn Bhd & Ors*

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The plaintiff filed a petition under s. 181 of the Companies Act 1965 relating to a number of companies. The parties were directed by the court to address preliminary points pursuant to O. 14A of the Rules of the High Court 1980. The two issues that arose were (i) whether the s. 181 petition could be maintained in view that both the affected companies, namely eighth and ninth respondents, had been wound up and (ii) whether a petition could be filed under s. 181 of the Companies Act 1965 against two or more companies at the same time.

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Held (dismissing the petition *in limine*):

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(1) Section 181 relief can only be related to a company which has not been wound up. Once the company has been wound up, the court cannot provide any relief under that section. Section 181 relief is statutory action and remedies which can only be entertained if the company is not wound up. The relief for oppression, if any, can only be sought under 181 and if the relief cannot be granted the court will have no jurisdiction to hear the 181 petition (*Henrick International Hotels & Resorts Pte Ltd v. YTL Hotels & Properties Sdn Bhd & Ors*). (para 13)

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(2) Section 181 of the Companies Act 1965 makes reference 'singularly' to 'a company' and under the interpretation provision of s. 4 of the Companies Act 1965, a company is defined as 'a company incorporated pursuant to this Act ...'.

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- A Further, O. 88 of the Rules of the High Court 1980, in particular, rr. 5 and 6 make reference ‘singularly’ to a company. (para 15)
- (2a) Joining more than one company and seeking relief may also lead to embarrassing pleadings and will stand as an anathema to separate legal entity principle and the court would not ordinarily allow this corporate jurisprudence to be defeated by joinder of companies when s. 181 of the Companies Act 1965 expressly does not provide so. Further, joinder will lead to prolixity in pleadings which may pave way for the petition to be struck out *in limine*. (para 15)
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Case(s) referred to:

- Ahmad Ramzi Mohamad Zubir v. Hj Abdul Hadi Awang & Ors* [2009] 7 CLJ 205 HC (**refd**)
- D *Automobiles Peugeot SA v. Asia Automobile Industries Sdn Bhd & Ors* [1988] 1 LNS 77 HC (**refd**)
- Balwant v. Kehri & Others* [1934] AIR Allahabad 619 (**refd**)
- Chatib Kari v. Mosbert Bhd* [1984] 2 CLJ 30; [1984] 1 CLJ (Rep) 501 HC (**refd**)
- E *Chieng Siew Hui v. Promax Road Construction Sdn Bhd & Ors* [2008] 10 CLJ 86 HC (**refd**)
- Creative Furnishing Sdn Bhd v. Wong Koi* [1989] 2 CLJ 93; [1989] 1 CLJ (Rep) 22 SC (**refd**)
- Dato’ Tan Toh Hua & Ors v. Tan Toh Hong & Ors* [2001] 1 CLJ 733 CA (**refd**)
- F *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor* [2002] 2 CLJ 57 FC (**refd**)
- Fargro Ltd v. Godfroy and Others* [1986] 3 All ER 279 (**refd**)
- Ferguson v. Wallbridge* [1935] 3 DLR 66 (**refd**)
- Fraser & Neave Ltd v. Yeo Hiap Seng Ltd* [1989] 1 CLJ 275; [1989] 2 CLJ (Rep) 809 CA (**refd**)
- G *Gamlestaden Fastigheter AB v. Baltic Partners Ltd and Others* [2007] 4 All ER 164 (**refd**)
- GS Gill Sdn Bhd v. Descente, Ltd* [2010] 5 CLJ 613 FC (**refd**)
- Henrick International Hotels & Resorts Pte Ltd v. YTL Hotels & Properties Sdn Bhd & Ors* [2003] 2 CLJ 445 (**fol**)
- H *Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & 7 Ors* [1995] 2 CLJ 900 CA (**refd**)
- Industrial Concrete Products Bhd v. Concrete Engineering Products Bhd & Others Suits* [2001] 8 CLJ 262 HC (**refd**)
- Jaya Medical Consultants Sdn Bhd v. Island and Peninsular Bhd & Ors* [1993] 1 LNS 32 HC (**refd**)
- I *Khaw Poh Chhuan v. Ng Gaik Peng (F) & Yap Wan Chuan & Ors* [1996] 2 CLJ 185 SC (**refd**)

- Kondapuram Raghuram v. Soo Peng & Ors* [2006] 5 CLJ 634 HC (**refd**) A
- Kredin Sdn Bhd v. Development & Commercial Bank Bhd* [1995] 4 CLJ 18 CA (**refd**)
- Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors and Another Application* [1994] 1 LNS 73 HC (**refd**)
- Kumagai Gumi Co Ltd v. Zenecon Pte Ltd & Ors and other appeals* [1995] 2 SLR 297 (**refd**) B
- Lawrie Grace v. Marcello Biagioli & 3 Ors* [2005] EWCA Civ 1222 (**refd**)
- Lee Ah Lin v. Lee Choon Ket & Ors* [2009] 1 LNS 387 HC (**refd**)
- Loo Mee Di v. Bioray Corporation (M) Sdn Bhd (Formerly Known As Bio-Ray Corporation Sdn Bhd) & 2 Ors* [1995] 4 CLJ 69 HC (**refd**)
- Lowe v. Fahey and Others* [1996] 1 BCLC 262 (**refd**) C
- Nash v. Halifax Building Society and another* [1979] 2 All ER 19 (**refd**)
- Ngiu-Kee Corporation (M) Bhd & Anor v. Pan-Pacific Construction Holdings Sdn Bhd* [2008] 3 CLJ 335 CA (**refd**)
- O'Neill and another v. Philips and others, Re a company (No 00709 of 1992)* [1999] 2 BCLC 1 (**refd**)
- Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716 FC (**refd**) D
- Pengurusan Danaharta Nasional Bhd v. Tang Kwor Ham & Ors And Another Appeal* [2007] 4 CLJ 513 FC (**refd**)
- Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337 CA (**refd**) E
- PMK Rajah v. Worldwide Commodities Sdn Bhd & Ors* [1984] 1 LNS 108 HC (**refd**)
- Re a Company (No 004502 of 1988) ex parte Johnson* [1992] BCLC 701 (**refd**)
- Re Bodaibo Pty Ltd* [1992] 10 ACLC 351 (**refd**) F
- Re Bright Pine Mills Pty Ltd* [1969] VR1002 (**refd**)
- Re Hailey Group Ltd* [1993] BCLC 459 (**refd**)
- Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1974] 1 LNS 136 FC (**refd**)
- Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung* [1978] 1 LNS 170 PC (**refd**) G
- Re Little Olympian Each-Ways Ltd (No. 3)* [1995] 1 BCLC 636 (**refd**)
- Re London School of Economics Ltd* [1986] 1 Ch 211 (**refd**)
- Re Richard Pitt & Sons Pty Ltd* [1979] 4 ACLR 459 (**refd**)
- Re Sin Lee Sang Sawmill Sdn Bhd; Leong Thong & Anor v. Chong Thim & Ors* [1989] 1 LNS 124 HC (**refd**)
- Re Tai Lap Investment Co Ltd* [1998] 4 HKC 438 (**refd**) H
- Sanford v. Sanford Courier Service Pty Ltd & Ors* [1988] 10 ACLR 549 (**refd**)
- Scottish Co-Operative Wholesale Society Ltd v. Meyer & Anothers* [1959] AC 324 (**refd**)
- See Hua Realty Bhd v. See Hua News Holding Sdn Bhd* [2007] 7 CLJ 152 HC I

- A *Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* [1979] 1 LNS 96 FC (**refd**)
S&S Power Finvest Limited & Anor v. S&S Power Corporation Sdn Bhd & Ors [2009] 1 LNS 106 HC (**refd**)
Sunrise West Sdn Bhd & Ors v. Pravin Mahtaney Ramchand & Anor [2011] 1 LNS 510 HC (**refd**)
- B *Tai Kwong Goldsmiths & Jewellers (In Receivership) v. Yap Kooi Hee & 16 Ors* [1994] 4 CLJ 959 SC (**refd**)
Teo Sing Teck v. Yui Chee Ming & 4 Ors [2008] 1 LNS 831 CA (**refd**)
Tuan Haji Ishak Ismail v. Leong Hup Holdings Bhd & 5 Others Appeals [1996] 1 CLJ 393 CA (**refd**)
- C *United Malayan Banking Corp Bhd v. Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1982] CLJ 547; [1982] CLJ (Rep) 358 FC (**refd**)
Wan Sagar Wan Embong v. Harun Taib (No 2) [2009] 1 CLJ 457 FC (**refd**)
Webb v. Stanfield & Anor [1990] 8 ACLC 715 (**refd**)
- D *Woodsville Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & Ors And Other Appeals* [2005] 2 CLJ 853 CA (**refd**)
Woodsville Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & 4 Ors (Consolidated With 3 Other Petitions) [1995] 1 CLJ 250 HC (**refd**)
Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd [2010] 1 CLJ 484 CA (**refd**)
- E **Legislation referred to:**
Companies Act 1965, ss. 4, 181(1), (2)(a), (b), (c), (d), (e), 218, 223
Rules of the High Court 1980, O. 88, O. 14A rr. 5, 6
For the petitioner - Kevin Wong; M/s Yeap Yong & Amy
- F *For the 1st, 2nd, 7th, 8th, 9th & 10th respondents - KM Chan; M/s Lim Kian Leong*
For the 3rd, 4th & 5th respondents - Sri Dev Nair; M/s Sri Dev & Naila
Reported by Suhainah Wahiduddin
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JUDGMENT

Hamid Sultan Abu Backer J:

- H [1] This is my judgment in respect of the petitioner's petition under s. 181 of the Companies Act 1965 and the court's direction for parties to address preliminary points pursuant to O. 14A of the Rules of the High Court 1980 and the petitioner's application – encl. 167 pursuant to O. 14A encompassing more issues to be
- I determined.

[2] The 1st, 2nd, 7th, 8th, 9th and 10th respondents are represented by one firm of solicitors (1st group of respondents) and the 3rd, 4th and 5th respondents are represented by another firm of solicitors (2nd group of respondents). A

[3] The parties have relied on the following cases: *Kumagai Gumi Co Ltd v. Zenecon-Kumagai Sdn Bhd & Ors and another application* [1994] 1 LNS 73; *Hock Hua Bank (Sabah) Bhd v. Yong Liuk Thin & 7 Ors* [1995] 2 CLJ 900; *Re Bright Pine Mills Pty Ltd* [1969] VR1002; *Sanford v. Sanford Courier Service Pty Ltd & Ors* [1988] 10 ACLR 549; *Re Little Olympian Each-Ways Ltd (No. 3)* [1995] 1 BCLC 636; *Lee Ah Lin v. Lee Choon Ket & Ors* [2009] 1 LNS 387; *Re Bodaibo Pty Ltd* [1992] 10 ACLC 351; *Re Tai Lap Investment Co Ltd* [1998] 4 HKC 438; *Henrick International Hotels & Resorts Pte Ltd v. YTL Hotels & Properties Sdn Bhd & Ors* [2003] 2 CLJ 445; *Kredin Sdn Bhd v. Development & Commercial Bank Bhd* [1995] 4 CLJ 18; *Woodsville Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & Ors And Other Appeals* [2005] 2 CLJ 853; *Yoong Sze Fatt v. Pengkalen Securities Sdn Bhd* [2010] 1 CLJ 484; *Singma Sawmill Co Sdn Bhd v. Asian Holdings (Industrialised Buildings) Sdn Bhd* [1979] 1 LNS 96; *Re London School of Economics Ltd* [1986] 1 Ch 211; *Balwant v. Kehri & Others* [1934] AIR Allahabad 619; *Lowe v. Fahey and Others* [1996] 1 BCLC 262; *Khaw Poh Chhuan v. Ng Gaik Peng (F) & Yap Wan Chuan & Ors* [1996] 2 CLJ 185; *O'Neill and another v. Philips and others, Re a company* (No 00709 of 1992) [1999] 2 BCLC 1; *Kondapuram Raghuram v. Soo Peng & Ors* [2006] 5 CLJ 634; *Re Kong Thai Sawmill (Miri) Sdn Bhd; Ling Beng Sung v. Kong Thai Sawmill (Miri) Sdn Bhd & Ors (No 2)* [1974] 1 LNS 136; *Jaya Medical Consultants Sdn Bhd v. Island and Peninsular Bhd & Ors* [1993] 1 LNS 32; *Woodsville Sdn Bhd v. Tien Ik Enterprises Sdn Bhd & 4 Ors (Consolidated With 3 Other Petitions)* [1995] 1 CLJ 250; *Re Sin Lee Sang Sawmill Sdn Bhd; Leong Thong & Anor v. Chong Thim & Ors* [1989] 1 LNS 124; *Industrial Concrete Products Bhd v. Concrete Engineering Products Bhd & Others Suits* [2001] 8 CLJ 262; *Teo Sing Teck v. Yui Chee Ming & Ors* [2008] 1 LNS 831; *S&S Power Finvest Limited & Anor v. S&S Power Corporation Sdn Bhd & Ors* [2009] 1 LNS 106; *Tuan Haji Ishak bin Ismail v. Leong Hup Holdings Bhd & 5 Others Appeals* [1996] 1 CLJ 393; *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu & Another Appeal* [2003] 4 CLJ 337; *Webb v. Stanfield & Anor* [1990] 8 ACLC 715; *Fargro Ltd v. Godfroy and others* [1986] 3 All ER 279; *Ferguson v.* B
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- A *Wallbridge* [1935] 3 DLR 66; *Re Kong Thai Sawmill (Miri) Sdn Bhd*; *Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung* [1978] 1 LNS 170; *Gamlestaden Fastigheter AB v. Baltic Partners Ltd and Others* [2007] 4 All ER 164; *Owen Sim Liang Khui v. Piasau Jaya Sdn Bhd & Anor* [1996] 4 CLJ 716; *Scottish Co-Operative Wholesale Society Ltd v. Meyer & Anothers* [1959] AC 324;
- B *Automobiles Peugeot SA v. Asia Automobile Industries Sdn Bhd & Ors* [1988] 1 LNS 77; *Chieng Siew Hui v. Promax Road Construction Sdn Bhd & Ors* [2008] 10 CLJ 86; *Lawrie Grace v. Marcello Biagioli & 3 Ors* [2005] EWCA Civ 1222; *Kumagai Gumi Co Ltd v. Zenecon Pte Ltd & Ors and other appeals* [1995] 2 SLR 297; *Re Hailey Group Ltd* [1993] BCLC 459; *Dato' Tan Toh Hua & Ors v. Tan Toh Hong & Ors* [2001] 1 CLJ 733; *Re a Company (No 004502 of 1988) ex parte Johnson* [1992] BCLC 701; *Ngiu-Kee Corporation (M) Bhd & Anor v. Pan-Pacific Construction Holdings Sdn Bhd* [2008] 3 CLJ 335; *Loo Mee Di v. Bioray Corporation (M) Sdn Bhd (Formerly Known As Bio-Ray Corporation Sdn Bhd) & 2 Ors* [1995] 4 CLJ 69; *Creative Furnishing Sdn Bhd v. Wong Koi* [1989] 2 CLJ 93; [1989] 1 CLJ (Rep) 22; *PMK Rajah v. Worldwide Commodities Sdn Bhd & Ors* [1984] 1 LNS 108; *Nash v. Halifax Building Society and another* [1979] 2 All ER 19; *Chatib Kari v. Mosbert Bhd* [1984] 2 CLJ 30; [1984] 1 CLJ (Rep) 501; *Tai Kwong Goldsmiths & Jewellers (In Receivership) v. Yap Kooi Hee & 16 Ors* [1994] 4 CLJ 959; *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Aziz Shah v. Dikim Holdings Sdn Bhd & Anor* [2002] 2 CLJ 57; *Pengurusan Danaharta Nasional Bhd v. Tang Kwor Ham & Ors And Another Appeal* [2007] 4 CLJ 513; *Re Richard Pitt & Sons Pty Ltd* [1979] 4 ACLR 459; *Ahmad Ramzi Mohamad Zubir v. Hj Abdul Hadi Awang & Ors* [2009] 7 CLJ 205; *Wan Sagar Wan Embong v. Harun Taib (No 2)* [2009] 1 CLJ 457;
- G *Sunrise West Sdn Bhd & Ors v. Pravin Mahtaney Ramchand & Anor* [2011] 1 LNS 510; *GS Gill Sdn Bhd v. Descente, Ltd* [2010] 5 CLJ 613; *Fraser & Neave Ltd v. Yeo Hiap Seng Ltd* [1989] 1 CLJ 275; [1989] 2 CLJ (Rep) 809; *United Malayan Banking Corp Bhd v. Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1982] CLJ 547; [1982] CLJ (Rep) 358.
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Brief Facts

- I [4] In the instant case the plaintiff has filed a s. 181 petition relating to a number of companies and the 8th and 9th defendants after the petition was filed were wound up by the court under a separate petition. In view of the decision of the Court of Appeal

in *Henrick's* case, it was pertinent for the judge, as a matter of law, to decide whether the instant petition can be sustained. In addition I also find the petitioner's complaint and relief were related to a number of companies which were made respondents namely 7th to 10th respondents. In consequence the court is also obliged to consider whether as a matter of law on the true construction of s. 181 of the Companies Act 1965 an oppressive petition can be mounted against more than one company as s. 181(1) says 'a company'. Section 181 reads as follows:

- (1) Any member or holder of a debenture of a company or, in the case of a declared company under Part IX, the Minister, may apply to the Court for an order under this section on the ground ...

[5] To deal with the above, on 11 July 2011, I framed two issues pursuant to O. 14A which read as follows:

- (a) Whether the current 181 petition could be maintained in view that both the affected companies, namely the 8th and 9th respondents have been wound up.
- (b) Whether a petition could be filed under s. 181 of the Companies Act 1965 against two or more companies at the same time.

[6] And I also directed with the consent of parties for the petition to be heard by affidavit evidence and all parties to file their written submission on the preliminary points of law and the merit of the petition. The petitioner has thereafter filed an application under O. 14A, encompassing more issues than which I have directed and it reads as follows:

that the following questions of law be determined, namely:

- (a) whether a winding-up order obtained against a company(ies) on a winding-up petition presented based on its presumed inability to pay debts automatically precludes relief from being granted against oppressors in a Section 181 of the Companies Act 1965 petition against such a company(ies) ('Nominal Respondent Company(ies)');
- (b) whether, the efficacy of the proceedings and relief under Section 181 of the Companies Act 1965 enacted by Parliament as a mode for oppressed shareholders of companies may be defeated by way of a device by alleged

- A oppressors by simply obtaining winding-up orders against Nominal Respondent Company(ies) who are merely nominal parties to oppression petitions;
- B (c) whether there is anything in the words of Section 181 of the Companies Act 1965 which states that relief for oppressive conduct shall only be available if the business of the Nominal Respondent Company(ies) is continuing or is to continue;
- C (d) given that relief on an oppression petition is a matter of wide discretion to address the complaints as at the date of the disposal of the oppression petition, whether, any winding-up orders made in the interim against Nominal Respondent Company(ies) merely affect the type of relief that is available including but not limited to an order of damages against the oppressors;
- D (e) whether the effects of any winding-up orders made against the Nominal Respondent Company(ies) may be dealt with or otherwise addressed by an application for leave under Section 226(3) of the Companies Act 1965 and the liquidator notified of the oppression petition proceedings to participate therein.
- E [7] The jurisprudence related to O. 14A has been well articulated in the Federal Court case of *Bato Bagi & Ors v. Government of the State of Sarawak* [2011] 6 CLJ 387, and I do not intend to repeat the same, save as to say that I am not obliged to answer the issues framed by the petitioner in the present form.
- F However, I will deal with the issues posted by court for which all parties have placed a comprehensive submission.
- G [8] On the 1st issue whether the petition can be sustained when the respondent company has been wound up, there is a Court of Appeal decision (Henrick's case) which is directly on point and the High Court is bound by the decision. However, the learned counsel for the petitioner thinks otherwise and says as follows:
- H The petitioner respectfully submits that the majority approach in the Henricks Case introduces a condition or bar in Section 181 as against the following:
- I (a) firstly, the Parliament has not expressly legislated such a condition or bar under Section 181;
- (b) secondly, the very utility of the procedure provided for under Section 181 touted as "specially enacted to overcome the problem posed by *Foss v. Harbottle* and to strengthen the position of the minority shareholders in limited companies"

would be lost by the majority approach since in most of the cases the oppressed minority petitioner would not be able to stop any potential winding up of the company in question (on the assumption that such oppressed minority petitioner even finds out about the winding up proceedings in the first place);

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- (c) thirdly, the majority approach does not accord with the purposive approach to statutory interpretation as set out in Section 17A of the Interpretation Acts, 1948 and 1967 and applied by the Federal Court in several cases recently; and

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- (d) fourthly, Section 181 can be fairly characterized as a class protection provision and as such its utility should not be taken away in such a fashion upon a restrictive interpretation to include matters that were never provided by the legislature.

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[9] I am mindful of the fact that the *Henrick* decision is only a majority decision of the Court of Appeal. The Federal Court may decide otherwise and that was the reason I directed parties to submit on the preliminary point as well as the petition so that the proceedings in the High Court will come to an end.

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[10] In the case of *Henrick International Hotels & Resorts Pte Ltd (supra)*, the respondent filed a petition to wind up the company under s. 218 of the Companies Act 1965. Subsequently, the appellant filed a petition under s. 181 of the same Act. The s. 218 petition was heard and accordingly, a winding-up order was granted. Subsequently, the respondent applied to strike out the s. 181 petition and the striking out was allowed on the ground that there could no longer be oppressive conduct after a liquidator had taken over affairs of the company. Richard Malanjum JCA (as he then was) held (by majority):

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In the circumstances, we were inclined to accept the proposition of law as expounded in *Webb v. Stanfield*. In other words, since a winding-up order has already been granted to wind-up the company with a liquidator appointed, the complaints of the appellant of oppressive acts and such other acts couched under s. 181 of the Act and as contained in the said petition could no longer be sustained.

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The learned judge below was therefore correct in his conclusion that it cannot be said that the effect or effects of an oppressive act or acts complained of would continue to subsist upon the granting of a winding-up order of a company followed by an appointment of a liquidator.

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and

... since a winding up order has already been granted to wind up the said company with a liquidator appointed, the complaints of the appellant of oppressive acts and such other acts couched under s. 181 of the Act and as contained in the said petition could no longer be sustained.

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and

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Another compelling reason in our view why the said petition could no longer be maintained after the granting of the winding up order of the said Company and the appointment of a liquidator is the provision of s. 223 of the Act.

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[11] The principles in the *Henrick's* case above was also considered and applied by the subsequent Court of Appeal case of *Teo Sing Teck (supra)*. In this case, it was held that the oppression petition filed under s. 181 of the Companies Act 1965 could no longer be sustained after the winding-up order has been granted. Furthermore, the court of appeal also considered and affirmed the application of s. 223 of the Companies Act 1965, which reads:

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Any disposition of the property of the company including things in action and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

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[12] In the most recent case of *S&S Power Finvest Limited & Anor (supra)* Justice Mary Lim Thiam Suan found that the company in question has been wound up and there is no stay of that winding-up order. The next issue to be considered, in line with *Henrick's* case above, is whether the s. 181 petition is still sustainable. The court held:

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While it may be true that allegations of oppression need not be of persistent acts, single incidents suffice or where the oppressive act has ceased but the effects remain (see *Owen Sim Lian Khui v Piasau Jaya Sdn Bhd* [1996] 4 CLJ 716, [1996] 1 MLJ 113), that is secondary to the threshold issue of whether these matters pleaded can still be properly canvassed and dealt with when the company has been wound-up. I think not.

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... it would be impossible to sustain a rational belief that the liquidator now in control of the company is conducting those affairs in a manner that is in any way oppressive ...

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and

The petition has become academic and is no longer sustainable.

[13] In my view the majority decision of the Court of Appeal is correct within the corporate jurisprudence. Section 181 relief is not moulded for minority shareholders 'to whip the dead horse'. If there is a wrong done to the company, there are other ways and means in which a liquidator can bring an action against recalcitrant parties. If there is a wrong done to a shareholder and the shareholder wants relief, that relief must be based on the fact that the company will still continue its business in the ordinary course, or alternatively the court will not give relief other than a winding up order if the circumstances are such. In consequence in my view s. 181 relief can only be related to a company which has not been wound up. Once the company has been wound up the court cannot provide any relief under that section. The law generally does not prohibit the shareholders to maintain a common law action against tortfeasors unless the articles otherwise provides and s. 181 relief is statutory action and remedies which can only be entertained if the company is not wound up. In saying so I am mindful of the fact that in almost all cases an action under common law by the shareholders against tortfeasors is unlikely to succeed in consequence of the majority rule in *Foss v. Harbottle*. I must say here separate legal entity principle was cultured to arrest disputes of personal nature like that between parties in the running of the partnership firm; and making the individual parties personally liable for their wrong. That is not part of corporate jurisprudence and the relief for oppression if any can only be sought under s. 181 and if the relief cannot be granted the court

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A will have no jurisdiction to hear the s. 181 petition. I have dealt with the jurisprudence relating to *Foss v. Harbottle* in the case of *Shamsul Saad v. Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors* [2010] 1 LNS 959 where I have observed as follows:

- B (a) The well established principle in the case of *Foss v. Harbottle* [1843] 2 Hare 461, advocates the proposition that: (i) courts will not interfere in matters of internal administration; (ii) it is for the majority members to decide the manner in which the affairs of the Company are to be conducted. The plaintiff's action is based on the jurisprudence relating to derivative action. And derivative action is generally commenced by a minority shareholder who is a member to seek relief on behalf of the Company against the majority or those who are in control of the Company, who has done wrong to the Company. Derivative action is an exception to the rule in *Foss v. Harbottle* (often referred to as proper plaintiff rule) where it was held that *prima facie*, every action must be brought in the name of the Company to remedy a wrong done to it. Subsequent cases have made much inroads to this strict rule and now there is even a statutory provision by way of section 181A of the Companies Act 1965 which was inserted by an amending Act in 2007, which promotes action for wrong done to the Company.
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[14] On the 2nd issue the learned counsel for the respondent says there is no authority directly on point. They argue the whole section is singularly worded and submit that the scheme of the Act does not contemplate a single petition against two or more companies and in consequence must be dismissed *in limine*. The learned counsel for the petitioner on this issue *inter alia* submits as follows:

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- G (a) there is no restriction in s. 181 as to the number of respondents that may be cited;
- (b) there is no restriction in s. 181 as to the number of companies on whose affairs a complaint or complaints may be pursued;
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- (c) Section 66 of the Interpretation Acts 1948 and 1967 provides guidance as to the reading of provisions in so far as singular or plural are concerned; and

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- (d) the matters falls to be regulated under procedural rules such as O. 4 and 15 of the Rules of the High Court 1980 as well as discretion under O. 15 r. 5 to direct a decoupling of the complaints, if necessary. A

[15] I am inclined to accept the submission of the learned counsel for the respondent. My reasons *inter alia* are as follows: B

- (a) Section 181 of the Companies Act 1965 makes reference 'singularly' to 'a company' and under the interpretation provision, s. 4 of the Companies Act 1965, a company is defined as 'a company incorporated pursuant to this Act ...' C

- (b) Further, O. 88 of the Rules of the High Court 1980, in particular rr. 5 and 6 make reference 'singularly' to a company.

- (c) In addition the remedies stated in s. 181(2)(a) to (e) are to be read in a singular manner. D

- (d) Joining more than one company and seeking relief may also lead to embarrassing pleadings and will stand as an anathema to separate legal entity principle and the court will not ordinarily allow this corporate jurisprudence to be defeated by joinder of companies when, s. 181 of the Companies Act 1965 expressly does not provide so. It must also be noted that any joinders will lead to prolixity in pleadings which may pave way for the petition to be struck out *in limine*. I have dealt with this area of jurisprudence in a number of cases. In *See Hua Realty Berhad v. See Hua News Holding Sdn Bhd & Ors* [2007] 7 CLJ 152, I have made the following observation: E
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The petition in this case is drafted in a manner that runs to 72 pages. This petition is, as if an entire set of complaints, whether or not they fall within the purview of s. 181, have all been hurled into the court with the duty foisted on the court to pick and choose to allow the petition. The court is not a filter of debris (see *Watson v Rodell* 3 Ch D 380). Where a petition is nothing more than a jangled mass of complaints all lumped together over which the court is unable to make any finding at all, of either oppression or undue prejudice, because the petition is nothing more than an exercise in prolixity, then it must fall. It has long been held that where the cause papers are so framed as to be too prolix, where they disclose immaterial facts, and set out at great length documents which could G
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- A not be material to the issues at hand, such as to as embarrass the opposite party (see *Cashin v Cradock* 3 Ch D 376), such pleadings are liable to be, and have, on occasions, been struck out (see *Davy v. Garret* [1877] 7 Ch D 473).
- B [16] After having given much consideration to the submission of the learned counsel for the petitioner I take the view the petition must be dismissed *in limine*. Even on merit I would not have allowed the petition. My reasons *inter alia* are as follows:
- C (a) The learned counsel for the petitioner has anchored the complaint in a nutshell in the submission by asserting as follows:
- D The Petition is clearly presented with the complaints of oppression made against the 1st to 5th Respondents for secretly diverting the business, property and/or corporate assets of the Affected Companies to their own companies, namely the 7th and 10th Respondents (“Diversion Scheme”) as set out in paragraphs 4.1 to 4.14 of the Amended Petition.
- E It is trite in law that acts of diversion at the expense of the Petitioner are oppressive and prejudicial conduct within the meaning of Section 181.
- F It is also clear that the learned Judge Dato’ Hishamuddin bin Mohd Yunus had clearly understood the Petition and found oppression on the same set of facts and evidence as set out in his Grounds of Judgment (Annexure A) as follows:
- G I have allowed the application as I am satisfied from the affidavit evidence that LCK and Mohd Isa have conducted the affairs of the affected companies in an oppressive or fraudulent manner. In so doing they were assisted and abetted by Samantha Lee, Raymond Chau and Alysia Wong. All these five persons named have unlawfully diverted the assets, business and corporate opportunities of the affected companies to the vehicle company, Crescent Logistics; and this is detrimental to the interests of the petitioner and the affected companies.
- H
- I The chronology of events as set out in Appendix A of the petitioner’s written submission at encl. A(5) provide a summarized but comprehensive overview of the respective role and wrongdoings of LCK, Mohd Isa, Samantha Lee, Raymond Chua, Alysia Wong and

Crescent Logistics pertaining to the affairs of the affected companies. There is a clear and ample documentary evidence furnished to the Court pertaining to the wrongdoings.

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I must say that the learned judge has set out the brief facts of this case in the said judgment and I will not repeat the same. However, at that material time of the said judgment the issues were related to the appointment of interim receivers, and the application by the petitioner before the learned judge was for appointment of interim receivers and not in the strict sense relating to finding of oppression relating to 181 petition.

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- (b) It is trite that the complaint anchored by the petitioner *prima facie* can be dealt with other than the s. 181 petition. There is much merit in the respondent's submission that the petitioner has not made out a case for oppression taking into consideration the factual matrix of the case.

D

- (c) There is much merit in the learned counsel for the first group of respondents to say that the petition is embarrassing and must be struck out for prolixity. The said submission reads as follows:

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The summary of the Petitioner's major complaint is found in paragraph 5.0 of the petition where he alleged that the:

- (i) 1st and 2nd Respondent have concluded the affairs of the affected companies in an oppressive and/or fraudulent manner;

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Our submission

Bearing in mind that the burden of proof of fraud is beyond reasonable doubt, there is a conspicuous absence from the petition particulars of the fraud as well as how this translates to oppression as now alleged in the petition.

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- (ii) 1st and 2nd Respondent are in breach of fiduciary duties and/or statutory duties owed to the petitioner;

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Our submission:

Likewise, the Petition does not allude to what these specific duties are and the particulars of the breach as alleged. The petition consists only of broad brush allegations with no specifics being provided to sustain or support the allegations.

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- A (iii) 1st and 2nd Respondent conspired with the 3rd, 4th and 5th respondents;

Our submission:

- B Nowhere in the Petition were there any particulars of the conspiracy. According to Bullen and Leake and Jacob's Precedents of Pleadings, the pleading should allege the agreement between the defendants to conspire and state precisely what was the purpose or what were the objects of the alleged conspiracy and it must then proceed to set forth with clarity and precision the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy and lastly it must allege the injury and damage occasioned to the Plaintiff thereby.
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- D (d) There is much merit in the submission of the learned counsel for the second group of respondents, that the Anton Pillar and Mareva Order were wrongfully obtained by the petitioners. The relevant submission read as follows:

- E In the Petition before this Court, it is pertinent to observe the following omissions in the Affidavit in Support of the Petition which had resulted in the draconian Anton Pillar and Mareva Order.

- F (i) That the Petitioner himself is indebted to the 1st and 3rd Respondents of over RM3 million hence the Ex-Parte Mareva order purportedly for a sum of RM774,000.00 ought not to have been granted. If this Petitioner's indebtedness of RM3 million to the 1st and 3rd Respondents had been disclosed at the ex-parte hearing of the Anton Pillar and Mareva, the Court, in my respectful submission would not have granted such draconian remedies.
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- H (ii) That the Petitioner himself together with his son has the controlling power (as directors) and the Petitioner as a shareholder in the 8th Respondent as well as a director in the 9th Respondent and did not avail himself of the protection given under Section 167 Companies Act 1965 which if exercised would have prompted him to take reasonable steps to stop the closure of the 8th Respondent which was saddled with financial difficulties from the very beginning. The Petitioner intended to sell his shares in the 8th Respondent to the 1st Respondent
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and this is reflected in the minutes of the 8th Respondent Board of Directors meeting held on 24.11.2005 which is found at Page 94 Volume 1 of the Bundle of Documents.

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- (iii) The Petitioner was never denied access to the books and records for the 8th and 9th Respondents and this is borne out by the depositions found in the Respondent's Affidavit dated 7.10.2008 found at Pages 3 to 4 Respondent's Bundle of Affidavits.

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It is also to be observed that being in control of the board, all the petitioner has to do is to make a request for inspection of documents and what is more glaring is that the petitioner had attended the Board of Directors meetings. He cannot be seen complaining about so called 'mismanagement', 'transfer of business' or 'oppression' where there is none in any event. Thus there was no necessity to obtain, that even on an *ex parte* basis, an Anton Pillar order.

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- (e) On the issue of the interlocutory injunction and whether an inquiry as to damages should be ordered the learned counsel for the first group of respondents says:

The case of *GS Gill Sdn Bhd v. Descente Ltd* [2010] 4 MLJ 609 (Tab 6) held that whether an inquiry as to damages should be ordered lies with the discretion of the trial judge. The undertaking to damages for an interlocutory injunction is given to court and not to the defendant. The trial judge is best equipped to decide on whether to order an inquiry into damages since he has adequate knowledge of the facts of the case. As a general rule if an interlocutory injunction is wrongly granted the trial judge should make an order for inquiry to damages on the undertaking given by the plaintiff. See also the case of *Fraser & Neave Ltd v. Yeo Hiap Seng Ltd* [1989] 1 MLJ 91.

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On the above issue the learned counsel for the 2nd group of respondents says:

It is our humble submission in the event, this Court do allow the Respondent's application (Enclosure 10), to set aside the ex-parte order dated 25-9-2008 (submission *vide* our written submission on 23-8-2011) with costs and do dismiss the Petition, then it is our humble submission that My Lord is vested with a discretion to order an inquiry as to damages since the Petitioner has given an undertaking to this Honourable Court as to damages in relation to the ex-parte order dated 25-9-2008.

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- A (f) I take the view taking into consideration the factual matrix of
this case and the fact that the petition could have been
dismissed *in limine* on the procedural issues raised by the
court which could have been taken at the earliest opportunity
by the respondent which was not done in this case, I exercise
B my discretion not to order inquiry as to damages even though
it will be proper to set aside all interlocutory orders which are
continuing.

[17] For reasons stated above:

- C (a) The petition is dismissed with costs. The petitioner to pay the
1st group of respondents a sum of RM30,000 and the 2nd
group of respondents a sum of RM30,000. The respondents'
to pay the allocatur fee before extraction of order for costs.
D The deputy registrar to issue certificate for the allocatur.
(b) The interlocutory orders which are continuing are set aside
with no order as to costs.

I hereby order so.

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